Investigation by the Department on its own motion regarding amendment of the present regulations, 220 C.M.R. 99.00 <u>et. seq.</u>, which set forth the procedures for the enforcement of G.L. c. 82, §40 ("Dig Safe Law").

I. <u>INTRODUCTION</u>

On December 4 and 5, 1998, the Department of Telecommunications and Energy ("Department") published notice that it was initiating rulemaking proceedings to amend the present regulations, 220 C.M.R. 99.00 et. seq., in response to recent amendments to

G.L. c. 82, § 40, otherwise known as the "Dig Safe law". The Dig Safe law requires excavators to premark and notify the underground plant damage prevention system ("Dig Safe Center") of their intent to excavate, before commencing excavation over facilities operated by public utility companies, municipal gas and electric departments, petroleum or petroleum products pipeline companies, private water companies, cable television companies, interstate natural gas pipeline companies and petroleum pipeline companies. Anyone violating the Dig Safe law, whether by failure to notify the Dig Safe Center in a timely fashion, by failure to premark the scope of the excavation, or by failure to mark the facilities, or otherwise, is liable to pay a civil penalty assessed by the Department. (1) The amended Dig Safe law went into effect on or about December 17, 1998.

The proposed regulations issued for comment were intended to accomplish several things: (1) to clarify the law by providing additional definitions; (2) to describe notification requirements, premarking procedures, marking procedures and reporting requirements; and (3) to set forth standards for assessing civil penalties for violations of the law and the implementing regulations.

A public hearing on the proposed regulations was held on January 4, 1999. Additional written comments were received until January 14, 1999. The Department received written comments from the following: Boston Edison Company ("Boston Edison"); Boston Gas Company ("Boston Gas"); Construction Industries of Massachusetts ("CIM"); Robert Cronin; Eastern Edison Company ("Eastern Edison"); Enstrat Strategic Environmental

Services ("Enstrat"); Senator Cheryl A. Jacques; Massachusetts Electric Company and Nantucket Electric Company ("Mass. Electric"); RCN-BECOCom, LLC ("RCN"); Southeastern Regional Services Group ("SERSG"); and Utility Contractors' Association of New England, Inc. ("UCANE"). The Department has reviewed the comments filed on behalf of these parties concerning the proposed regulations contained in this docket, and today promulgates final rules amending the Dig Safe regulations, 220 C.M.R. 99.00 et. seq.

II. COMMENTS ON PROPOSED REGULATIONS

A. Premarking

1. Premarking Sites over 500 Feet in Length

a. Comments

Boston Edison and Eastern Edison recommend that, for continuous excavations over 500 feet in length, premarking should be required for the first 500 feet (Boston Edison Comments, p. 2; Eastern Edison Comments, p.1). CIM requests that continuous excavations over 100 feet, rather than over 500 feet in length, be exempted from premarking requirements (CIM Comments, p.1).

b. Analysis and Findings

The language in the Dig Safe law is unclear with regard to premarking a continuous site over 500 feet in length. Under the definition of "premark" it states, "[p]remarking shall not be required of any continuous excavation that is over 500 feet in length." G.L. c. 82, § 40. Section 40A, however, contains the following language, "[n]o excavator installing a new facility . . . shall . . . make an excavation . . . unless . . . before the excavation is to be made, such excavator has premarked not more than 500 feet of the proposed excavation " G.L. c. 82, §40A.

We can see no added safety benefit in requiring a portion of an excavation site to be premarked, while exempting the rest. For such large excavations, detailed notice to the Dig Safe Center should sufficiently inform a utility company of the area to be excavated. It is the opinion of the Department that it was the intent of the legislature to exempt continous excavations over 500 feet in length from the premarking requirement. Therefore, the Department finds that, for excavations over 500 feet in length, no premarking is required.

In light of this finding, the Department rejects the proposals of Boston Edison, Eastern Edison, and CIM.

2. Premarking Where White Marks Inappropriate

a. Comments

Eastern Edison states that an excavator should use an alternate color when premarking an area in which white markings may interfere with traffic or pedestrian control (Eastern Utilities Comments, p. 1).

b. Analysis and Findings

The Department is in agreement with Eastern Edison that there is a need for an alternate color when premarking areas in which white will cause confusion or may not easily be seen. Accordingly, the Department finds that, when premarking in an area where white marks may not easily be seen or may create confusion, such as near pavement, or crosswalks, or when marking very large sites where finding premarks may be more difficult, the excavator should consider using an alternate color in order to eliminate confusion. The excavator, however, must inform the Dig Safe Center in the notice that an alternate color has been used.

3. Premarking Guardrails and Fences

a. Comments

The new Dig Safe statute requires premarking by an excavator. G.L. c. 82, § 40A. It is recommended by CIM that when excavating to replace a guardrail or fence, the preexisting guardrail or fence should be able to be used as a premark (CIM Comments, p. 1).

b. Analysis and Findings

The Department is of the opinion that guardrails and fences that are being identically replaced may serve as a premark. The Department finds that when a guardrail or fence replacement is collinear with the original, the pre-existing guardrail or fence may be used as a premark. If the path of the new guardrail or fence, however, differs from the original guardrail or fence pathway, an excavator must premark that area to be excavated which will differ from the pre-existing guardrail or fence.

4. Premarking Before Notifying Dig Safe

a. Comments

Mass. Electric suggests that an excavator must complete premarking prior to notifying the Dig Safe Center (Mass. Electric Comments, p. 1).

b. Analysis and Findings

The Department agrees with Mass. Electric that an excavator should complete premarking before notifying the Dig Safe call center. Once a utility company receives the notice of excavation from Dig Safe, it must mark the site within 72 hours. Allowing excavators to premark after they notify Dig Safe would increase the risk of a utility company arriving to mark a site that has not yet been premarked. A requirement that a premark be completed before notifying the Dig Safe Center is in the best interests of the excavator. The Department believes it was the legislature's intent to require premarking to be in place before notice is given. Accordingly, the Department finds that an excavator must premark a site before notifying Dig Safe.

5. Premarking Septic Systems

a. Comments

Senator Jacques recommended that workers emptying septic systems on private residential land should be exempt from Dig Safe premarking and notice requirements. Senator Jacques stated that such activity takes place periodically at a fixed location, and involves digging with hand-tools between six and nine inches deep. The Senator points out that under the Dig Safe law, gardeners are allowed to dig with hand-tools without having to premark the area; the Senator states that because septic maintenance work is so similar in this respect to gardening, septic maintenance on residential property should be exempt from the premarking and notice requirements.

b. Analysis and Finding

Septic maintenance is a repetitive activity; over the course of years, it takes place at the same location on a residential property. According to Senator Jacques, and comments made at the public hearing, the only digging conducted when septic tanks are emptied is with the use of hand-tools and goes no deeper than six to nine inches in the ground. This activity is comparable enough to gardening on residential property that no premark is necessary. Accordingly, the Department finds that when a septic maintenance worker conducts service on a septic tank requiring only the removal of the septic tank's cap, and uses hand-tools to dig no deeper than six to nine inches in the ground, at a fixed location, the activity is exempted from premarking and notice requirements.

B. Marking

1. Comments

Boston Gas recommended that the corridor method of marking be adopted as the standard for the Commonwealth, and the center line method of marking be eliminated (Boston Gas Comments, p. 2). Boston Gas stated that the corridor method of marking better protects public safety than does centerline marking because two marks made on the ground's surface makes clear to the excavator where the facility is located, while the center line method leaves it up to the excavator's discretion whether to measure or estimate where the facility might be located (Boston Gas Comments, p. 2).

2. Analysis and Finding

The center line method, a nationally recognized standard, is promoted by the American Public Workers' Association. It provides the necessary information that an excavator needs, that is, the width, material, and location of an underground facility. The Department appreciates Boston Gas' concern for safety. However, the Department is of the opinion that eliminating the center line method and using only the corridor method is a variance from the industry standard that would increase the risk of damage and serious injury. Therefore, the Department takes this opportunity to align the Commonwealth's Dig Safe regulations with the industry standard. Accordingly, the Department finds that the center line method is now the only method accepted for marking underground facilities, and the Department hereby eliminates the corridor method as an accepted method of marking.

C. Marking on Private Property

1. Comments

Enstrat inquires whether the new regulations require utility companies to mark on private property within 15 feet of a premarked area, since previously, according to Enstrat, utility companies refused to mark on private property (id. at 2).

2. Analysis and Findings

With regard to a company's responsibilities, the Dig Safe law makes no distinction between marking on private or public property. The Dig Safe law applies to both situations. While most electric distribution companies do not operate privately-owned service lines, such companies are required to mark underground facilities under their ownership, whether on private property or not, just as other companies with underground facilities. Accordingly, the Department finds that a company, when notified by the Dig Safe Center of an impending excavation, shall accurately mark its underground facilities, in accordance with the requirements herein, regardless whether the site is located on private or public property.

D. Chasing a Plume

1. Comments

Enstrat commented that it often positions drilling locations to "chase a plume" of contamination based upon information gathered on the day of excavation (Enstrat's Comments, p. 1). Enstrat comments that the new regulations will create significant difficulty in drilling because such plumes may spread outside a premarked area, thereby

requiring another call to Dig Safe, and down time as the excavator waits the required 72 hour period before continuing excavation (id.).

2. Analysis and Finding

The Department finds that a company should premark and notify the Dig Safe Center of as large an area as needed to take into account such possible movement of the excavation. Under section 99.02, the definition of premarking states, "to delineate the general scope of the excavation or boring on the paved surface of the ground using white paint, or stakes or other suitable white marking on nonpaved surfaces." 220 C.M.R. 99.02. By giving notice of excavation and premarking a large enough area, excavators should be able to move about the site during a day's excavation. Should the plume be of a containment which could jeopardize public health, and/or a water supply, the premark and notification may be classified as an emergency.

E. Excavation

1. Comments

RCN suggested clarification regarding non-mechanical excavations in § 99.06 (RCN's Comments, p. 2). RCN noted that it is often necessary to use mechanical means to penetrate initially a paved or rock surface, and that non-mechanical means can then be employed beyond such initial excavation (<u>id.</u>).

2. Analysis and Findings

The Department agrees with RCN that such clarification is needed. Accordingly, the Department finds that when excavating in close proximity to any underground facilities, mechanical means may be used for the initial penetration of pavement or rock, or other such material, and non-mechanical means shall be used after the initial material is penetrated until the excavator locates the underground facility.

F. Informal Review Process

1. Comments

UCANE suggested that informal decisions should be mailed to the respondent by overnight mail, return receipt requested (UCANE Comments, p. 1). This organization also recommended that the time period in which to request an adjudicatory hearing be extended from seven to ten days (<u>id.</u>). UCANE suggested the language in the regulations that failure to respond to a Department decision is deemed an admission should be removed (<u>id.</u>).

2. Analysis and Finding

UCANE provided no argument to support its request that informal review decisions be sent by overnight mail, and the Department sees no reason for this amendment to the regulations. The Department does find UCANE's recommendation that decisions be mailed return receipt requested helpful in that it would provide confirmation whether or not a respondent received the decision. Accordingly, the Department finds that decisions in informal reviews of Notices of Probable Violations should be sent return receipt requested to the respondent. The Department agrees with UCANE that the time period in which to request an adjudicatory hearing should be extended from seven days to ten days. The ten-day period will ensure that a respondent, after receiving the decision of the informal review by mail, has sufficient time to decide whether or not to request an adjudicatory hearing. The Department finds that, after an informal review decision has been issued, a respondent has 10 days from the date of receipt in which to request an adjudicatory hearing.

Also, UCANE provided no argument to support its request that the Department remove from the regulations language that failure to respond to a decision is deemed an admission be removed. The Department finds no reason for such a change to the regulations.

G. Abandoned Lines

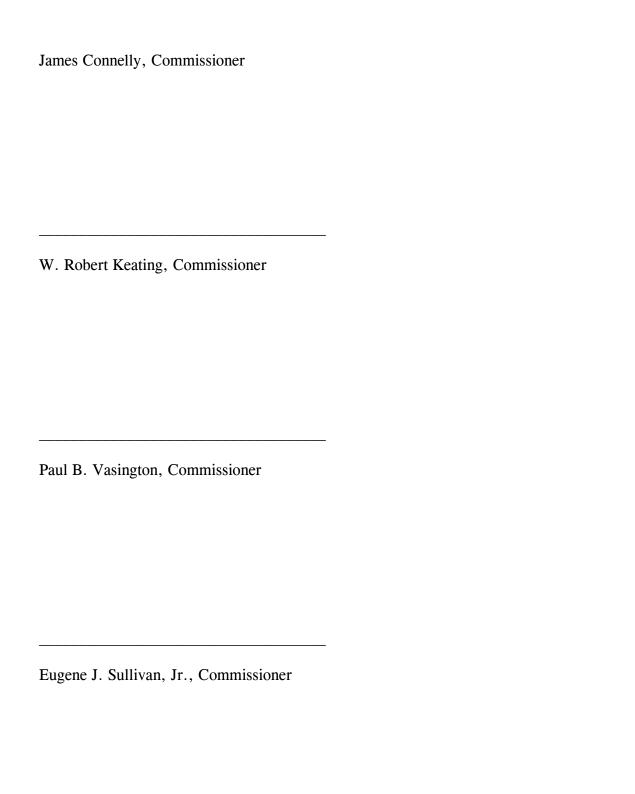
1. Comments

SERSG commented that there are abandoned mains, usually gas mains, in the public ways which are not required to be marked prior to excavations (SERSG Comments, p. 1). SERSG states that abandoned mains pose a problem to an excavator who uncovers one because the excavator will not know if the main is abandoned or not (id.). To address this issue, SERSG recommends that the Department require abandoned mains and conduits buried under public ways be removed when they are replaced by new facilities (id. at 2). SERSG also recommends that the Department require companies with abandoned mains to mark them as such after completing a review of their historical records in order to create a database and map of such mains (id.). SERSG recommends a Department requirement that companies keep complete and accurate records of their distribution system available to cities and towns, as well as a requirement that companies sponsor training for municipal highway and fire department personnel regarding what to do in the event of a broken main or conduit (id.).

2. Analysis and Findings

The Department notes that SERSG's comments appear to regard a subject worth further discussion. The topic of these comments, however, is beyond the scope of this rulemaking proceeding. Accordingly, the Department makes no finding with regard to SERSG's recommendations on the subject of abandoned mains and conduit. The Department notes, however, that Section 99.05(2) of the regulations requires utility companies to indicate the width and material of the underground facility when marking.

This requirement may enable excavators to differentiate between live and abandoned utilities.
III. ORDER
Accordingly, after notice, hearing and consideration, it is hereby
ORDERED: That 220 C.M.R. 99.00 <u>et. seq.</u> be amended to incorporate the changes contained in this Order, appended hereto, and that such regulations, as revised, be effective upon publication in the Massachusetts Register; and it is
FURTHER ORDERED: That the Secretary of the Department attest to a true copy of the regulations and transmit said attested true copy to the Office of the Secretary of State for the Commonwealth for publication in the Massachusetts Register for inclusion in the Code of Massachusetts Regulations and that said 220 C.M.R. 99.00 et. seq. shall be effective upon publication in the Massachusetts Register.
By Order of the Department,
Janet Gail Besser, Chair



1. G.L. c. 82, § 40E exempts state and local government bodies from forfeiture of any penal sum. This section also exempts residential property owners from forfeiture of penal sums for failure to premark for an excavation on such person's residential property.